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IN THE

Supreme Court of the United States

October Term, 1970
No. 1154

TOM HALDE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,

Respondent.

REPLY BRIEF.

Petitioner respectfully submits that the respondent's statement of the question presented begs that self-same question, and that respondent's arguments similarly are based on unsound premises and fall with those premises. Moreover, respondent's arguments overlook—understandably, since the case was decided so recently—the impact of this Court's recent holding in *Mayberry v. Pennsylvania*, ... U.S. ....., No. 121, decided January 20, 1971.[1]

Question Presented.

The issue on this petition is: (1) as stated at page 2 of the petition; and (2) indistinguishable, except for

[1] That case will be cited hereafter as "*Mayberry*", followed by a page reference to the slip opinion.

severity of the punishment imposed,[2] from the issue presented in *Mayberry*.

Respondent is less than candid in by starting [Brief, page 1] with the assumption that the judge was not embroiled or disqualified. The whole question here is whether due process, itself, *requires* that the judge be disqualified. A judge is disqualified because the law deems him to be, not because he says or decides he is.

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[2]Petitioner concedes that, by any reckoning, the punishment imposed upon him was less serious than that inflicted on Mayberry. He notes, however, that there is likewise no comparison between petitioner's conduct, even given its worst interpretation, and the cruel, scurrilous and aggravated behavior of Mayberry. Further, it should be noted that, whatever its intrinsic severity, the effects of such punishment upon a lawyer's career are a serious matter, indeed.

RESPONSE TO ARGUMENT.

I.

Respondent Has Not Shown Freedom From Disqualification.

Respondent contends, correctly, that this proceeding was brought under state statutory authority, but that is beside the point. The point is whether it comports with due process. In this, respondent seems to believe that *Offutt v. United States*, 348 U.S. 11 and *Ungar v. Sarafite*, 376 U.S. 575, constitute the alpha and omega of due process concern with contempt [Brief, 3 and 4]. It is sufficient to point out that this Court has recently found a due process prohibition against acting simultaneously as victim and judge, notwithstanding the fact that the case did not present the facts or involvement ("an activist seeking combat") which characterized *Offutt* or *Ungar* (*Mayberry*, pages 10-11).

This Court held that due process requires "a public trial before a judge other than the one reviled by the contemnor" (*Mayberry*, 11-12). That is precisely what petitioner did not receive here. Respondent's characterization of the motivation for the trial judge's anger as "sarcastic and sardonic" or fitted "to no useful purpose", does not change the requirement of due process. Whether a judge's partisanship is motivated by blatant and repulsive actions or subtly provocative ones is an inconsequential distinction. The point is that due process requires another judge who was not stung and who has "the impersonal authority of the law" to make the adjudication (*Mayberry*, page 12).

II.

While the Fact That the Trial Was Concluded May Not Be Controlling, It Is Significant.

Respondent, somewhat caught on twin horns—the requirement that connection with a court proceeding is an element of the offense of contempt, versus the self-evident fact that there is no urgency about adjudicating contempt after the proceeding is over—has conceived a new form of judicial hybrid: A trial which is in progress only for the purpose of being disrupted by contempt. Again, *Mayberry* is dispositive. This Court there drew a sharp distinction between the sometimes-inescapable duty of imposing summary contempt under trial-urgency circumstances, on the one hand, and the situation—presented here and in *Mayberry*—where no such need exists. (*Mayberry*, 9-10).

Therefore, petitioner's contention [Brief, page 5] that the distinction is immaterial has simply and recently been rejected by this Court.

III.

Respondent's Contention, That Trial by a Disqualified Judge Is Cured by State Appellate Review, Is Disingenuous and Untenable.

The most novel contention raised by respondent is to the effect that, even if the trial judge was disqualified by his personal involvement, that is cured by the fact that the state court of appeal and supreme court rejected applications for relief—without hearing or opinion [Brief, pages 6-7].

Acceptance of that concept would lead to a rather bizarre result: Any time a citizen aggrieved by a violation of constitutionally protected right in a state court

exhausts his state remedies before coming to this Court, the very fact of exhausting those remedies would be held a cure for the initial invasion.[3] The point is so disingenuous as to be unworthy of extended discussion. Suffice it to say that Ed Tumey had unsuccessfully sought review of his conviction by a disqualified judge through the courts of Ohio before petitioning this Court, and that did not stop this Court from acting (*Tumey v. Ohio*, 273 U.S. 510). Moreover, and parenthetically, it should be mentioned that the argument is not even good California law. The denial of a petition for extraordinary writ, without hearing, order to show cause or opinion, is not a determination of the merits to which that petition is addressed (*Hagan v. Superior Court* (1962) 56 Cal.2d 767, 770, 22 Cal.Rptr. 201, 371 P.2d 977).

Conclusion.

Certiorari should be granted and the case either set for briefing and argument in this Court as to the effect of *Mayberry* on purported contempts by lawyers, or else remanded to the state courts for re-determination under *Mayberry*.

Respectfully submitted,

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[3]Had petitioner not sought review in the California appellate structure, but rather had come directly to this Court, the respondent would undoubtedly—and correctly—have complained over his failure to preserve the constitutional objection.